

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP895-CR

Cir. Ct. No. 2009CF15

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LENG VANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Leng Vang appeals from a judgment of conviction of repeated sexual assault of the same child and from an order denying his postconviction motion alleging ineffective assistance of trial counsel. He argues that his trial counsel was ineffective for not objecting to testimony that a witness

deemed the victim's accusations to be truthful. We conclude that although trial counsel failed to make a proper objection, Vang was not prejudiced. We affirm the judgment and order.

¶2 Vang was charged with sexually assaulting his stepdaughter when she was between three and eight years old. The victim testified that incidents took place in the car, in the family living room, and in the bedroom she shared with her mother and Vang. The victim did not report the assaults until Vang moved out of the house, about a year after they stopped. She told her mother and older half-brother on separate occasions but nothing was done about her report. A few months later, while visiting her older half-sister, the victim told her half-sister about the assaults. The victim's half-sister called the police. The victim was twelve years old when she testified about the assaults on the first day of Vang's jury trial.

¶3 After the victim's testimony, her older half-brother testified that after Vang moved out of the home, the victim told him that Vang had raped her. He tried to comfort the victim but did not tell anyone about the report. He was then asked, "Do you have, in all this time that you've lived with [the victim], do you have an opinion as to her truthfulness?" He answered, "I don't think she would lie. She has no reason to." Vang objected to the answer on the ground that it lacked foundation. The objection was overruled.

¶4 The claim of ineffective assistance of trial counsel is based on counsel's failure to make a proper objection to that question posed to the victim's half-brother about his opinion as to the victim's truthfulness. A claim of ineffective assistance of counsel requires a defendant to show both that counsel's representation was deficient and that the deficiency was prejudicial. *Strickland v.*

Washington, 466 U.S. 668, 687 (1984). Whether counsel’s performance was ineffective presents a mixed question of fact and law. *State v. Maloney*, 2005 WI 74, ¶15, 281 Wis. 2d 595, 698 N.W.2d 583. The circuit court’s determination of what counsel did or did not do, along with counsel’s basis for the challenged conduct, are factual matters which we will not disturb unless clearly erroneous. *See id.* However, the ultimate determination of whether counsel’s conduct constituted ineffective assistance is a question of law. *Id.*

¶5 A witness, expert or otherwise, may not testify that another physically and mentally competent witness is telling the truth. *State v. Tutlewski*, 231 Wis. 2d 379, 387, 605 N.W.2d 561 (Ct. App. 1999); *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). At the *Machner*¹ hearing trial counsel did not suggest any strategic reason for not making the *Haseltine* objection. We will assume, without deciding, that the challenged testimony constituted improper comment on the credibility of another witness and trial counsel performed deficiently in not making a proper objection to exclude or strike the witness’s answer.

¶6 We turn to the prejudice prong of the ineffective assistance of counsel inquiry. To prove prejudice, “the defendant must show that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *State v. Thiel*, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (quoting *Strickland*, 466

¹ A *Machner* hearing addresses a defendant’s ineffective assistance of counsel claim. *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

U.S. at 694). We look at the totality of the evidence in evaluating prejudice. *Strickland*, 466 U.S. at 695.

¶7 Vang's theory of defense was that the victim's half-siblings had bribed her to accuse Vang of sexual assault so that their mother would not reconcile with Vang. The jury heard evidence that the victim's half-siblings and their spouses did not like Vang and on at least one occasion, years before the victim reported the sexual assaults, one family member threatened Vang. The victim's mother denied that the victim had told her about the assault when Vang moved out of the house. The victim's mother indicated that the accusations came up after she told her older daughter the unexpected news that she intended to move with her younger children to Minnesota to reconcile with Vang. The testimony by the victim's half-brother that he believed the victim to be truthful did not undermine the evidence offered in support of Vang's theory of defense.

¶8 There was no physical evidence corroborating the assaults and the evidence was a credibility battle between the victim's testimony and Vang's testimony denying any sexual contact. However, the victim's testimony was corroborated on multiple levels. Vang acknowledges that the victim's testimony was consistent with her earlier taped interview except as to the timing of the car assault, the number of assaults that occurred in the living room and bedroom, and whether her half-brothers would have been at home when the assaults occurred. Details the victim testified to regarding an assault while in the car at a park were also consistent with the disclosure to her half-sister. The victim explained why she had not reported the assaults right away because she lacked knowledge that the conduct was wrong. An older half-sister confirmed the conversation she had with the victim that explained that adults should not have sexual contact with children. The victim also explained how her relationship with her mother changed because

she reported the assaults and that her mother did not want her to say anything. Her mother's testimony was consistent with the possibility that she had discouraged the victim from saying negative things about Vang.

¶9 There was also evidence that Vang had the opportunity to commit the assaults despite the large number of people living in the house. The victim shared a bedroom with Vang and her mother. The evidence was that Vang was at home with the children when his wife worked and was responsible for getting the victim off to school in the morning. The victim indicated that some assaults in the bedroom took place as she was getting ready for school. The victim's teenage half-brothers spent a great deal of time in their rooms where their computers and video games were located.

¶10 The evidence supports the jury's verdict. The objectionable testimony was not mentioned in closing arguments. *Strickland*, 466 U.S. at 695-96, recognizes that "[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." This is a case in which the error had a trivial effect. Our confidence is not undermined by the isolated comment as to the victim's truthfulness on the first day of trial from a witness shown to likely harbor ill-will towards Yang.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2011-12).

